STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of the Complaint of the
CARRIER CREEK DRAIN DRAINAGE DISTRICT
for condemnation of private property for
drainage purposes in Eaton County, Michigan.

APPELLEE'S RESPONSE IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130125
Court of Appeals Docket No. 255609

Eaton County Circuit Court
Lower Court File No. 03-67-CC
Hon. Thomas S. Eveland

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

ECHO 45, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130126
Court of Appeals Docket No. 255610

Eaton County Circuit Court
Lower Court File No. 03-68-CC
Hon. Thomas S. Eveland

130125-6-7

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant,

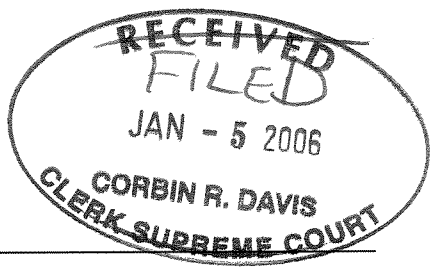
and

STANDARD FEDERAL BANK,

Defendant.

Supreme Court Docket No. 130127
Court of Appeals Docket No. 255611

Eaton County Circuit Court
Lower Court File No. 03-69-CC
Hon. Thomas S. Eveland



Michael G. Woodworth (P26918)
Geoffrey H. Seidlein (P32401)
Stacy L. Hissong (P55922)
HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.
Attorneys for Plaintiff-Appellee
5801 West Michigan Avenue
P.O. Box 80857
Lansing, Michigan 48908-0857
Telephone: (517) 886-7176

Gary J. Galopin (P31981)
Attorney for Defendant Standard Federal Bank
2600 W. Big Beaver Road
Troy, Michigan 48084
(248) 637-2556

Graham K. Crabtree (P31590)
Fraser Trebilcock
Davis & Dunlap, P.C.
Attorneys for Defendants-Appellants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants seek leave of this Court to appeal the following:

1) The Order Barring Unpreserved Claims dated September 30, 2003, that disallowed Defendant Echo 45, LLC, from presenting evidence of a "possibility of rezoning" of property at the condemnation trial due to Defendant's noncompliance with MCL 213.55(3)[1]; and

2) The Final Judgments entered in the cases against Land One, LLC, that reflect the Trial Court's Opinions, upon conclusion of the bench trial, that the subject properties suffered no damage to the remainder as a result of the taking.[2]

The Court of Appeals, in a published per curiam opinion, affirmed the holdings of the Trial Court. Plaintiff-Appellee contends that leave to appeal should be denied because Defendants-Appellants have not established the requisite grounds for appeal pursuant to MCR 7.302(B). Furthermore, Plaintiff-Appellee asserts that these cases were correctly decided by both the trial court and the Court of Appeals, and that denial of the application for leave to appeal is appropriate.

---

[1] See Trial Court's Order dated September 30, 2003, and the Opinion on which that Order was based, Appendices G-H to Defendants-Appellants' Application.

[2] See Final Judgments and Opinions, Appendices A-F to Defendants-Appellants' Application.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Plaintiff-Appellee presents the following counter-statement of questions presented:

I **DID THE TRIAL COURT ERR IN REFUSING TO CONSIDER THE EVIDENCE REGARDING POTENTIAL REZONING FOR OFFICE USE OFFERED BY DEFENDANT ECHO 45, LLC?**

The Court of Appeals says "No."

The Trial Court would say "No."

Plaintiff-Appellee says "No."

Defendants-Appellants say "Yes."

II **DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS NO DAMAGE TO THE REMAINING PROPERTY ON THE PARCELS OWNED BY DEFENDANT LAND ONE, LLC?**

The Court of Appeals says "No."

The Trial Court would say "No."

Plaintiff-Appellee says "No."

Defendants-Appellants say "Yes."

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

These matters involve the condemnation of property interests on three separate parcels owned by Defendants-Appellants. Each Defendant-Appellant is a Michigan limited liability company solely owned by Michael Eyde. (Trial Transcript, Vol V, p 13.[3]) The sole issue at trial was the amount of just compensation for the properties. Below is a summary of each action as it relates to each property affected:

Docket Number 255609 (Eaton County Circuit Court File 03-67-CC)
Parcel Number 040-027-200-090-00 (Land One, LLC):
This property is located south of Mt. Hope Highway and west of Creyts Road.

Current Zoning:	Industrial
Interest Acquired:	24.5± acres Drain/Flooding Easement
Total Parcel Acreage:	77.22± acres
Estimated Just Compensation:	$465,000.00
Additional Award in Judgment:	$128,000.00
Total Just Compensation Judgment:	$593,000.00

(See Trial Court's Opinion dated January 26, 2004, Appendix A to Defendants-Appellants' Application.)

Docket Number 255610 (Eaton County Circuit Court File 03-68-CC)
Parcel Number 040-022-300-081-00 (Echo 45, LLC)
This property is located south of I-496 and abuts Canal Road to the east.

Current Zoning:	"RB" Low Density Residential
Interest Acquired:	13.5± acres in fee
Total Parcel Acreage:	45.0± acres
Estimated Just Compensation:	$92,000.00
Additional Award in Judgment:	$80,800.00
Total Just Compensation Judgment:	$172,800.00

(See Trial Court's Opinion dated January 26, 2004, Appendix B to Defendants-Appellants' Application.)

[3] All cited Trial Transcript excerpts are attached as Composite Appendix 1.

Docket No. 255611 (Eaton County Circuit Court File 03-69-CC)
Parcel Number 040-022-400-042-00 (Land One, LLC and Standard Federal Bank):
This property is located south of I-496 and at the Creyts Road/Mt. Hope Intersection.

Current Zoning:	Commercial
Interest Acquired:	7.75± acres in fee
	21.05± acres for Drain/Flooding Easements
Total Parcel Acreage:	119.74± acres
Estimated Just Compensation:	$1,105,000.00
Additional Award in Judgment:	$461,950.00
Total Just Compensation Judgment:	$1,566,950.00

(See Trial Court's Opinion dated January 26, 2004, Appendix C to Defendants-Appellants' Application.)

In their Application, Defendants-Appellants devote a significant portion of their Statement of Material Proceedings and Facts (pp 7-9) to discussion of alleged legal malpractice by one of their original trial counsel[4] and the issue of necessity of the taking, an issue that was summarily dismissed by the Court of Appeals. (See Court of Appeals Order Granting Partial Dismissal of Appeal dated June 18, 2004.)

The Application predominantly concerns the circuit court's pre-trial ruling, and subsequent consideration during trial, on a single motion: Plaintiff's Motion for Order Barring Unpreserved Claims and Motion in Limine dated July 28, 2003. (See Appendix 2.)

Defendants-Appellants' appraiser opined that, although the Echo 45, LLC, property was zoned residential, it should be valued as office use, resulting in significant damage to the remainder after the taking. However, discovery revealed that site plans predicated upon office zoning were never prepared, such a rezoning was never sought by Defendant-Appellant Echo 45,

[4] At all times throughout the trial court proceedings, Defendants-Appellants were also represented by co-counsel William Tomblin.

and Defendant-Appellant's appraiser never inquired of any county or local official regarding the possibility of rezoning.[5]

Plaintiff's Motion was brought in part pursuant to MCL 213.55(3), which states in pertinent part:

> If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency...within 90 days after the good faith written offer is made pursuant to section 5(1) or 60 days after the complaint is filed, whichever is later... If an owner fails to file a timely written claim under this subsection, the claim is barred.

It is undisputed that no such claim for damages was made by Defendants-Appellants within the time period required by MCL 213.55(3) and that no request for an extension of time was made.

Plaintiff-Appellee argued that any possibility of rezoning value component should be precluded because the possibility of such a rezoning was too remote and speculative in this case, given Defendants-Appellants' failure to set forth in either the appraisal report or facts disclosed during subsequent discovery, any realistic potential for such rezoning. Plaintiff-Appellee also argued in its motion and brief that both the rezoning and the "damage to the remainder" claims should be prohibited due to the failure to provide timely notice under MCL 213.55(3). (Appendix 2.)

The Trial Court held that the Defendants-Appellants were barred from presenting any claims related to damages to the remainder in all of the cases, and were precluded from claiming

---

[5] See Brief and excerpted transcript of Michael Eyde deposition attached to Plaintiff's Brief in Support of Motion Barring Unpreserved Claims & Motion in Limine, Appendix 2. See also Trial Transcript, Appendix 1, Vol IV, pp 126-127.)

damages arising from a hypothetical rezoning classification in the Echo 45 case. (See Opinion dated September 17, 2003, and Order granting Motion in Limine dated September 30, 2003, Appendix G and H to Defendants-Appellants' Application.) The Court of Appeals affirmed the decision of the Trial Court, finding all of Defendants-Appellants arguments to the contrary to be "without merit."

On Defendants-Appellants' Motion for Reconsideration, the Trial Court allowed Defendants-Appellants to present evidence of damages to the remainder at trial. (Trial Transcript, Vol IV, pp 50-51.)

Defendants-Appellants then advances damage to the remainder claims relating to a 3.16 acre area within the Land One industrial parcel and a 4.8 acre area within the Land One commercial parcel. It is important to note that neither these specific damage to the remainder claims nor any facts to support them were ever disclosed in any of Defendants-Appellants' appraisal reports, deposition testimony or discovery responses, but instead were presented for the very first time at trial. (Trial Transcript, Vol IV, pp 87, 142-143.)

The Trial Court, at the conclusion of a 6-day bench trial, issued written opinions finding no damage to the remainders. As to the Land One industrial parcel (Case No. 03-67-CC), the Trial Court noted the lack of credibility of Defendants-Appellants' testimony and evidence with regard to damage to the remainder:

> The plaintiff retained appraiser Robert Vertalka and the defendant hired Donald F. Essa. Both appraisers are well qualified in experience and education. Mr. Essa has two appraisals on the property, one on June 30, 2003 and the other on September 24, 2003. His conclusion as to value differed by a considerable amount. Essa's explanation for reappraising the property was that (1) the Court had ruled that it would not consider damages to the remainder, and (2) that he received additional information. Both reasons are unsatisfactory to this Court. The first because the

> Court's ruling at the time should have nothing to do with the assessment of the partial taking; the second because all of the information utilized by Essa in the second appraisal was available at the time of his first. In addition, Mr. Essa's decision to reappraise was instigated in part by the owner's expressed dissatisfaction with his figure as "too low".
>
> The Court subsequently reversed its decision not to permit evidence of damage to the remainder. Interestingly, Mr. Essa then found damage to four portions of the property, from his initial conclusion that there was damage only to a different portion.

(See Trial Court's Opinion dated January 26, 2004, Appendix A to Defendants-Appellants' Application.)

Additionally, as to the Land One commercial property (Case No. 03-69-CC), the Trial Court noted: "This land is unique in that it has 'good' land and 'bad' land. There is a considerable difference between the value of the encumbered and unencumbered property. The encumbered property here is very low land, wetlands and land not conducive to commercial use." The Trial Court held in its Opinion:

> The appraisers disagreed as to damage to the remainder. Mr. Vertalka found that the purchase of the 28± acres does not affect the remainder. Mr. Essa opined that because the landowner lost accessibility to 4.8 acres that he should be compensated at $720,000.
>
> The Court finds Mr. Vertalka's testimony more credible. It does not appear to the Court that given the nature and location of the 4.8 acres, that the potential use of the property would change. No credible evidence was introduced as to how the use of the 4.8 acres would change because of the taking. Accordingly the Court finds no damage to the remainder.

(See Trial Court's Opinion dated January 26, 2004, Appendix C to Defendants-Appellants' Application.)

Upon such findings, the Trial Court rendered its Final Judgments, which were affirmed by the Court of Appeals. As to the damages to the remainder claims, the Court of Appeals concluded, "Considering the evidence of record, as well as the deference accorded to the trial court's superior ability to judge the credibility of the witnesses, MCR 2.613(C), we will not disturb the trial court's conclusions."

COUNTER STATEMENT AND STANDARDS OF REVIEW

The appropriate standard of review as to the interpretation of MCL 213.55(3) is *de novo*. *People* v *Cl*ay, 468 Mich 261 (2003).

With regard to Defendants-Appellants' second issue, the Trial Court's finding of no damage to the remainder, Plaintiff-Appellee concurs with Defendants-Appellants that the "clearly erroneous" standard of review applies. *Begola Services, Inc* v *Wild Bros,* 210 Mich App 636, 639 (1995).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER THE EVIDENCE REGARDING POTENTIAL REZONING FOR OFFICE USE OFFERED BY DEFENDANT ECHO 45, LLC

A. Defendants-Appellants Have Made a Party Admission that They Failed to Preserve for Presentation at Trial the Issue of the Potential for Rezoning

Defendants-Appellants filed a legal malpractice claim against their prior counsel regarding allegations of wrongdoing in the trial court proceedings. One of the specific claims of malpractice raised by Defendants in that action is that their prior counsel "[f]ailed to preserve for presentation at trial all pertinent legal issues, including the potential for rezoning, damages to the remainder and resultant arguments for enhancement of damages by the appraisers..." (Complaint, Appendix 3, p 6.)

Plaintiff-Appellee requests that the Court take judicial notice of these claims asserted in Defendants' legal malpractice complaint against their prior counsel as dispositive of this issue on appeal. "A trial court may take judicial notice of any records of the court where it sits. Moreover, it is clear that 'an appellate court may properly take judicial notice of any matter which the court of original jurisdiction may take notice.'" *People* v *Sinclair*, 387 Mich 91, 103 (1972) (internal citation omitted).

B. The Time Limitation in MCL 213.55(3) is Clear and Unequivocal

Section 5(3) of the Uniform Condemnation Procedures Act, MCL 213.55(3), as amended by Public Act 474 of 1996, requires landowners in condemnation cases to actively participate in the valuation process. In cases where a landowner believes the condemning authority's written good faith offer does not include or fully include items of compensable property or damage, the landowner must timely notify the authority of this omission or forfeit his claims for those items. In *City of Novi* v *Woodson*, 251 Mich App 614, 623 (2002), the Court of Appeals, in a case of

first impression regarding this statutory time limit, reviewed the language of this provision, found it unambiguous, and observed: "[T]he statute must be enforced as written. No further judicial construction is required or permitted."[6]

The decision in *Woodson, supra,* like any published decision of the Court of Appeals, is controlling statewide and must be followed until contradicted by another panel of that Court or reversed or overruled by the Supreme Court. *Tebor* v *Havlik*, 418 Mich 350, 362 (1984).

The Court in *Woodson* made the following determinations regarding the requirements of MCL 213.55(3), all of which the Trial Court correctly ruled were binding in the instant proceedings:

- In order to comply with the statute, a landowner must inform the condemning agency why its original good faith offer is insufficient on an item specific and detailed basis. Conclusory statements without accompanying detail and support are insufficient. (*Woodson, supra* at 625.)

- A condemning agency is not obligated to seek out information of a landowner's potential claims without first receiving notice of the seriousness or basis for the alleged damages. (*Woodson, supra* at 625-626.)

- MCL 213.55(3) acts as a statute of repose because it prohibits making a claim after a specified period. It is designed to relieve condemning agencies from open-ended liability. (*Woodson, supra* at 628.)

- Where a landowner's claims are barred by operation of this statute, a trial court's refusal to grant a motion seeking to preclude the presentation of evidence to establish those claims constitutes reversible error. (*Woodson, supra* at p 629.)

Even more deficient than the insufficient notice the landowners gave in *Woodson,* Defendants-Appellants in these cases never provided Plaintiff-Appellee with any notice

---

[6] This rule of statutory construction was taken from the Supreme Court's decision in *Crowe* v *Detroit*, 465 Mich 1, 6 (2001). In *People* v *Phillips*, 469 Mich 390, 395 (2003), the Supreme Court referred to the same rule when it said: "Stated differently, a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."

whatsoever specifying and/or supporting a claim that the Drainage District's original good faith offers failed to include items of damage or compensable property. The trial court was, therefore, correct in excluding a claim of damage related to the potential rezoning classification.

C. A Possibility of Rezoning is an Item of Compensable Property or Damage Under MCL 213.55(3)

Despite clear law on this matter, Defendants-Appellants attempt to distinguish the Echo 45 case from the requirements set forth in MCL 213.55(3) and *Woodson* by asserting that the potential for rezoning only goes to the definition of "highest and best use" and not to a claim for damage like the business interruption damages advanced in *Woodson*. Defendants-Appellants incorrectly argue that rezoning is merely a matter of a difference of opinion between appraisers. This argument is without merit.

The plain language of the statute is as follows:

> **If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of compensable property or damage** for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency...within 90 days after the good faith written offer is made pursuant to section 5(1) or 60 days after the complaint is filed, whichever is later... If an owner fails to file a timely written claim under this subsection, the claim is barred. MCL 213.55(3) (emphasis added).

Under the statute, it is irrelevant what was, or was not, included in Plaintiff-Appellee's original appraisal of the property. The landowner has an absolute obligation to notify the governmental entity of any item of compensable property or damage not included in the offer, regardless of whether such item of damage was overlooked in the Plaintiff's appraisal. In this case, the good faith offer did not include damages based on valuation of the property assuming a

change in zoning, so the landowner was obligated to provide notice in order to preserve the claim for trial.

Furthermore, in a condemnation context, damage related to rezoning valuation *is* akin to damage related to business interruption, for these are just two of the many factors to be considered in determining "just compensation" in eminent domain proceedings:

> The United States Supreme Court has had a similar and unvarying view of this matter, holding... that the value of land must include "every... element entering into its cash or market value, as tested by its capacity for any and all uses..." Then, again, in 1933, the Supreme Court held that "the requirement that 'just compensation' shall be paid is comprehensive and includes all elements..." The calculation is to "include any element of value that [property] might have by reason of special adaptation to particular uses." Yet again in 1956, the high court held that "just compensation includes all elements of value that inhere in the property..."
>
> Michigan's understanding of just compensation has been identical in all relevant particulars. In *In re Widening of Gratiot Avenue*, 294 Mich 569, 574-575; 293 NW 755 (1940), we explained that "[t]he determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case." In considering various factors, we have held that compensation may include an award for the taking of a leasehold, for fixtures, **for business interruption expenses, and even for the increase in value attributable to the reasonable probability that the property would be rezoned.** Thus, in our law, "just compensation" was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value. *Silver Creek Drain Dist* v *Extrusions Division Inc*, 468 Mich 367, 377-378 (2003) (emphasis added; internal citations omitted).

An increase in value to property due to the possibility of rezoning is a damage component, or an element of "just compensation," the same as the business interruption damages claimed in *Woodson, supra.* Accordingly, in order to comply with MCL 213.55(3), Defendants-Appellants were required to provide notice of all claims within 90 days of the good faith offer or

within 60 days of the filing of the complaint. No notice whatsoever was filed, and Defendants-Appellants did not request a time extension, so the claim was rightfully barred by the Trial Court.

In its analysis of this claim, the Court of Appeals looked to the "plain and ordinary meaning of 'compensable damage'" as being "loss, harm, or injury which is eligible for compensation." On that basis, the Court of Appeals held:

> So, Echo intended to claim a right to just compensation for the loss of value of the possibility of rezoning as a consequence of the taking, which was not included in the good faith offer. Thus it is clearly a claim for compensable damage that was required, under MCL 213.55(3), to be disclosed within the time limits set forth in the statute. Therefore, the trial court properly excluded evidence of this undisclosed claim.

Defendants-Appellants seem to suggest that a landowner could ignore the notice requirement under MCL 213.55(3) by simply producing an appraisal report within a Scheduling Order deadline, arguing that the Legislature never intended to require landowners to possess appraisal expertise. This argument is flawed for two reasons. First, Defendants-Appellants suggest by this argument that only an expert appraiser would recognize the possibility of rezoning. To the contrary, the law regarding the possibility of rezoning claims *require* a landowner to be aware of the possibility. A possibility of rezoning is not an esoteric analysis of land use in a written appraisal report, but rather a true, actual potential for rezoning based on events that the landowner has already set in motion.

Defendants-Appellants' attempt to fabricate legislative intent is inconsistent with the specific language of MCL 213.55(3) and misses the entire point of the 1996 Amendments. The intended purpose of the 1996 Amendments in MCL 213.55(3) was to require landowners to provide governmental entities with all necessary information to correct good faith offers before litigation was "full blown," specifically not allowing a landowner to merely sit back and

withhold information necessary for valuation until appraisals are exchanged. The 1996 Amendments to MCL 213.55(3) require a landowner to inform governmental entities up front about facts disclosing a realistic possibility of rezoning. To allow a radical interpretation of MCL 213.55(3) to somehow discount the specific time constraints provided through discovery orders eliminates the entire Legislative intent to resolve these types of issues before litigation.

Without specific information from a landowner as to facts supporting a rezoning, a governmental entity is not in a position to make the determination. The Court of Appeals correctly affirmed the Trial Court's exclusion of Defendants-Appellants' possibility of rezoning claim.

D. Defendants-Appellants Failed to Show that There was a Reasonable Probability of a Zoning Change

In addition to the bar of rezoning claims under MCL 213.55(3), Defendants-Appellants presented insufficient evidence to support a finding for valuation based on the potential change in zoning.

In *State Highway Commissioner* v *Eilender*, 362 Mich 697 (1961), the Supreme Court made it clear that speculative future uses incompatible with existing zoning are not to be assigned a valuation in condemnation proceedings. The Court held:

> We look at the value of the condemned land at the time of the taking, not as of some future date. If the land is then zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation. But, on the other hand, it has been held, if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value. *Id* at 699 (internal citations omitted).

The Court in *Eilender* held that where an application for rezoning to a classification relied upon by the landowner's appraiser had been filed prior to, and was pending at the time of,

the taking, and it was established that such a rezoning would allow uses consistent with those in areas surrounding the property taken, the reasonable possibility of a change in zoning could properly be assigned a monetary value.

In *State Highway Commissioner v Minckler*, 62 Mich App 273, 277-278 (1975), the Court affirmed a trial court's decision to strike that landowner's expert's testimony regarding the possibility of rezoning, writing:

> Defendants... reliance on *Eilender* is misplaced... [T]he possibility of a zoning change is not nearly as likely in the present case as it was in *Eilender, supra*. Here, there is no pending zoning change; there is not even a petition for one... *Eilender* involved a factual situation that was just the opposite of the present one. The possibility of a zoning change is far too remote and speculative to be a proper consideration for valuing the property in the present case; a private purchaser would not give substantial consideration to it.

Additionally, in *Hartland Twp* v *Rodd*, 189 Mich App 591, 597-598 (1991), this Court said: "The record establishes that defendant never sought rezoning of the parcel... The possibility of a zoning change was far too remote and speculative to be a proper consideration for valuing the parcel."

Thus, as set forth in *Eilender, Minckler*, and *Hartland Twp,* a possibility of rezoning claim cannot be advanced merely on a hypothetical highest and best use speculation in an appraisal, but must instead be supported by evidence of a landowner's efforts to achieve a change in zoning.

Contrary to the facts presented in *Eilender, supra*, Defendant Echo 45 never applied for rezoning of the property or did anything else to pursue rezoning.[7] Defendants-Appellants'

[7] See excerpted transcript of Michael Eyde deposition attached to Plaintiff's Brief in Support of Motion Barring Unpreserved Claims & Motion in Limine, Appendix 2.

appraisal states that the current zoning classification is "'RB' Low Density Residential District" and that "[l]and use in the immediate area consists predominantly of single family homes and vacant land." (See Appraisal by Daniel Essa, Appendix P to Defendants-Appellants' Application, pp 1, 19.) Defendants-Appellants were allowed to present offers of proof at trial regarding the possibility of rezoning. Both Defendants' owner, Michael Eyde, and Defendants' Appraiser testified that office use would be the highest and best use of the property. (Trial Transcript, Vol V, pp 69-70; and Vol IV, pp 124-127.[8]) However, neither witness testified at trial or deposition that any effort had been made to get the property rezoned, and the testimony by Defendants-Appellants' appraiser shows that the possibility of rezoning was wholly speculative:

> Q: And did you do any investigation in terms of checking with any formal governmental officials to determine if the property could be rezoned to professional office?
>
> A: No. (Trial Transcript, Vol IV, pp 126-127.)

Defendants-Appellants failed to present any factual support for a valuation based on a potential zoning change.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT THERE WAS NO DAMAGE TO THE REMAINING PROPERTY ON THE PARCELS OWNED BY DEFENDANT LAND ONE, LLC

Defendants-Appellants argue that damage to the remainder should have been awarded for the Land One commercial and industrial parcels because "two considerable parcels of property - a 3.16 acre area within the industrially-zoned parcel and a 4.8 acre area within the commercially-zoned parcel – have become landlocked." (Defendants-Appellants' Application, pp 37-38.)

First, these lands are not landlocked in the true sense, as Defendants-Appellants admit in their Application: "Mr. Eyde has testified that a culvert would have sufficed for [the purpose of

gaining access] before the taking. Afterward, it will require construction of a bridge." (Defendants-Appellants' Application, p 38.) Thus, access is still available; it is just a matter of what needs to be installed on the property to gain access.

Second, the issues regarding the 3.16 acre area and 4.8 acre area were literally presented for the very first time at trial, as admitted by Defendants' appraiser. (Trial Transcript, Vol IV, p 87.) In fact, the appraiser testified that he changed his opinion regarding damages to the remainder after his second deposition in the case, taken less than a month before trial. (Trial Transcript, Vol IV, pp 142-143.)

Defendants' expert shifted opinions of value several times throughout the proceedings. For these cases, he prepared two separate appraisal reports on the commercial property, two separate appraisal reports on the industrial property, and three separate appraisal reports on the Echo 45 parcel. (Trial Transcript, Vol IV, pp 128-129.) One of his stated reasons for the changes was the owner, Michael Eyde's, expression of dissatisfaction because the landowner felt the amounts were too low. (Trial Transcript, Vol IV, p 130.)

In contrast, Plaintiff-Appellee's expert's opinion of value did not change from the time of the good faith offer through trial, except for minor adjustments to account for passage of time. Plaintiff-Appellee's expert contended throughout the proceedings that there was no damage to the remainder occasioned by the 3.16 acre area and the 4.8 acre area. The appraiser testified that there was no damage to the remainder because the areas of the properties being condemned were already highly encumbered, in both a physical and legal sense, before the taking. The industrial parcel was encumbered by regulated wetlands, was included in the 100-year floodplain, and had an existing easement to Delta Township running through it. (Trial Transcript, Vol II, pp 31-33.)

[8] Appendix 1.

The commercial parcel was even more significantly encumbered in the before state with regulated wetlands, floodplain, pre-existing easements, poor soils, and an irregularly-shaped piece of land[9] running through the center of the property that was owned in fee by Delta Township. (Trial Transcript, Vol II, pp 53-55.)

Regarding the industrial parcel, Mr. Vertalka testified:

Q: And you said there weren't damages to the remainder when you did your report on November 9, 2002?

A: Correct.

Q: Based upon our discussion on Monday and our review of the plans, review of the project and questions that I asked about the impact of the project on this industrial parcel do you now hold the opinion that there are damages to the remainder?

A: I do not.

Q: Even though we went through all of those points about lack of access?

A: Correct.

Q: And you still hold that the property in the after state to the Defendant landowner has the same utility use?

A: As it did in the before.

Q: Okay. Even though they can't get to it?

A: Well, they can get to it. The restrictions are the same. There was the wetlands that they needed to cross to get to it before and also regulated floodplain areas. And he still needs to cross those areas and get permits to it to get to the property. And, in addition, he'd also have to get a permit to cross the flooding easement. But the wetland and the flooding easement are at the 860-foot level. So they're all the wetlands. (Trial Transcript, Vol III, pp 12-13.)

As to the commercial property, Mr. Vertalka testified as follows:

---

[9] Mr. Vertalka describes the shape of this Delta Township property as that of a shepard's cane. (Trial Transcript, Vol II, p 55.) This property is depicted on the drawing attached to Defendants-Appellants' Application as Appendix O.

Q: Okay. So let's go back and just see if I can get you to concede that in the after state, after the project is constructed, isn't it an absolute certainty that he cannot arrive at any access to the portion in yellow?

A: I don't think so.

Q: You don't think so? You think he can get there?

A: I think he would – in terms of the loss of – the question is has he lost any utility because of the taking. And he would've had a difficult access to get through over the wetlands and the Delta Township floodplain. Is it more difficult or does it preclude because now we've added a floodplain easement? I don't know that he wasn't landlocked before.

Q: What we do know for sure – and my question wasn't about utilities, my question was about access. We do know for sure that he's landlocked in the after state?

A: Here again it's an easement is what the drain commissioner is acquiring and not the fee. So he would have the right over the easement in some fashion. It would probably have to be permitted or something. Clearly it's more difficult. You know, clearly it's more difficult. But I'm not – but it's not to say that it wasn't more difficult in the before state also.

Q: Ok. We'll move on if we can. You still hold the opinion that there are no damages to the remainder, correct?

A: Correct. (Trial Transcript, Vol III, pp 42-43.)

While Defendants-Appellants' appraisal expert held the contrary opinion (that there *were* damages to the remainder), it was clearly within the trial court's discretion to weigh the conflicting testimony and credibility of the witnesses. The fact finder was not obligated to accept one expert's testimony over the other. *Detroit* v *Larned Assoc*, 199 Mich App 36, 41 (1993). And while Defendants-Appellants correctly cite the factors that "the trier of fact may properly consider... 1) Its reduction in size; 2) Its altered shape; 3) Reduced access; 4) Any change in utility or desirability of what is left after the taking; 5) The effect of application zoning ordinances on the remaining property; and 6) The use that the condemning authority will make

of the property taken...[10]"; it is clear that the Trial Court did, in fact, take those factors into consideration, as almost all of the factors are specifically referenced in the Court's written Opinions for the Land One parcels. (See Opinions attached to Defendants-Appellants' Application, Appendix A and C.)

In this case, the experts were not in agreement regarding just compensation, with damage to the remainder as a component. Therefore, the decision as to value was left to the finder of fact – in this case, the Trial Court. The determination of value in condemnation cases "is not a matter of formula or artificial rule but of sound judgment and discretion based upon the relevant facts in the particular case." *State Hwy Commr* v *Eilender*, 362 Mich 697, 699 (1961). In these cases, the Trial Court was forced to sift through the conflicting testimony to arrive at a final determination of value. The final judgment after a condemnation trial "may not be disturbed by the Supreme Court unless palpably contrary to the evidence, the province of the Court being to review the evidence to see that the finding is supported thereby." *In re Grand Haven Hwy*, 357 Mich 20, 29 (1959) (internal citation omitted).

The Court of Appeals has ruled: "An award of just compensation that falls within the range of testimony ought not to be disturbed." *Hartland Twp, supra* at p 598 (citing *In re Condemnation of Lands in the City of Battle Creek*, 341 Mich 412 (1954)). The range of values presented to the Trial Court was as follows:

[10] See M Civ JI 90.12, and Defendants-Appellants' Application, p 37.

Case	Plaintiff[11]	Defendant[12]
Land One 03-67-CC	$465,000	$1,101,000
Echo 45 03-68-CC	$92,000	$394,000
Land One 03-69-CC	$1,105,000	$2,550,000

The Trial Court's conclusion of value, in each case, fell within the range of values:

Land One 03-67-CC - $593,000
Echo 45 03-68-CC - $172,800
Land One 03-69-CC - $1,566,950

Because all of the Trial Court's final conclusions of value fell within the range of testimony, they should not be disturbed on appeal. *Id.* Furthermore, as noted by the Court of Appeals in this case, the trial court is to be accorded deference for its "superior ability to judge the credibility of the witnesses," pursuant to MCR 2.613(C). As Defendants-Appellants have not shown clear error here, the Trial Court's ultimate conclusions regarding the credibility of the witnesses and the final determinations of value should remain undisturbed.

[11] (Trial Transcript, Vol VI, pp 97-98, 42-43.)
[12] (Trial Transcript, Vol VI, pp 135, 142, 146.)

RELIEF REQUESTED

For the foregoing reasons, Plaintiff-Appellee respectfully requests that the Court deny Defendants-Appellants' Application for Leave to Appeal.

Respectfully submitted,

HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.

January 5, 2006

BY: 

Michael G. Woodworth (P26918)
Geoffrey H. Seidlein (P32401)
Stacy L. Hissong (P55922)
Attorneys for Plaintiff-Appellee
5801 West Michigan Avenue
P.O. Box 80857
Lansing, MI 48908-0857
(517) 886-7176

F:\Data\Client A-M\Eaton CDC - 5003\Carrier Creek - 0055\LandOne\SC Resp Application.doc